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Headscarves return to the CJEU: unfinished business

ABSTRACT

In 2017, the CJEU brought out its judgments in two cases concerning bans on the wearing of Islamic headscarves at work as possible discrimination on the grounds of religion or belief under Directive 2000/78/EC. These judgments led to heavy criticism, mainly because the CJEU did not do a rigorous proportionality test and left a number of questions open. Two recent preliminary references from courts in Germany present the CJEU with an opportunity to expand on the earlier judgments and to answer the questions they left open. It is submitted that the CJEU should deal with this unfinished business in a way which respects Europe's religious diversity and ensures that the ground of religion and belief does not become the poor relation of EU anti-discrimination law.

Keywords:

Islamic Headscarves; Religious Discrimination; Direct Discrimination; Indirect Discrimination; Proportionality test, Charter of Fundamental Rights of the EU.

§1. Introduction

In March 2017, the Grand Chamber of the Court of Justice of the European Union (CJEU) issued its first two judgments concerning prohibitions on the wearing of Islamic headscarves at work as possible discrimination on the grounds of religion or belief under Directive 2000/78/EC.¹ The judgments were criticised quite heavily in the literature for a number of different reasons, including that they left some questions open.² There are, at present, two

¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16. These cases are: Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4 S Secure Solutions NV*, EU:C:2017:203; Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v. Micropole Univers SA*, EU:C:2017:204.

² See: E. Howard, 'Islamic Head Scarves and the CJEU: Achbita and Bougnaoui', 24, 3 *Maastricht Journal of European and Comparative Law* (2017) pp. 348-366 and the literature referred to there. See also: M. Bell, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace', 17, 4 *Human Rights Law Review* (2017) pp. 784-796; S. Hennette-Vaucher, 'Equality and the Market: the Unhappy Fate of Religious Discrimination in Europe', 13 *European Constitutional Law Review* (2017) pp. 744-758; S. Jolly, 'Religious Discrimination in the Workplace: the European Court of Justice Confronts a Challenge', 3

preliminary references to the CJEU from different courts in Germany concerning the wearing of Islamic headscarves at work.³ It is argued here that the questions asked in these two preliminary references address a number of the points of criticism raised against the judgments in *Achbita* and *Bougnaoui*. The CJEU will, therefore, have an opportunity to expand on and explain its earlier decisions and, contrary to what it did in the 2017 decisions, take a lead in the protection offered by EU law against religion or belief discrimination. This article starts with a short summary of *Achbita* and *Bougnaoui* and an overview of the criticism raised against these cases. Then, the two preliminary references and the questions asked, including the views of the referring courts, will be examined. It will be argued that the CJEU should reply to the preliminary questions referred to it in such a way as to provide protection against religion or belief discrimination which is as strong as the protection provided by EU law against the other grounds of discrimination covered. If the CJEU does not do this, it will leave religious minorities without the protection provided for other minorities.

§2. Achbita and Bougnaoui

Both *Achbita* and *Bougnaoui* concerned women who wanted to wear an Islamic headscarf to work and, when their employer asked them to remove their headscarf, they refused to do so and were then dismissed. Ms Achbita was a receptionist working for G4 S who was permanently contracted out to a third party. When she informed her employer that she wanted to start wearing the Islamic headscarf to work, G4 S replied that this was against their rule that employees could not wear visible signs of their political, philosophical or religious beliefs in the workplace. The Belgian Court of Cassation asked the CJEU if this was direct discrimination on the ground of religion or belief contrary to Article 2(2)(a) of Directive 2000/78/EC. Ms Bougnaoui worked as a design engineer for Micropole and she occasionally went out to work at customers' sites. She was asked to remove her headscarf after a customer's staff member complained about it and, when she refused, she was also dismissed. The French Court of Cassation asked the CJEU whether the wish of a customer to no longer

European Human Rights Law Review (2017) pp. 308-314; T. Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to go After Achbita and Bougnaoui?', 10, 2 *Review of European Administrative Law* (2017) pp. 47-73; L. Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace', 8, 2 *European Labour Law Journal* (2017) pp. 232-257; E. Relano Pastor, 'Religious Discrimination in the Workplace: Achbita and Bougnaoui', in U. Belavusau and K. Henrard (eds) *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing, 2019), 183-202.

³ Case C-804/18 *IX v. Wabe e.V.*, OJ C 182/4, 27 May 2019; Case C-341/19 *MH Müller Handels GmbH v. MJ*, lodged 30 April 2019).

have services provided by an employee wearing a headscarf was a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC. It is worth noting that there were diverging opinions of the Advocates General⁴ in these cases.

In *Achbita*, the CJEU held that there was no direct discrimination because the internal rule referred ‘to the wearing of visible signs of political, philosophical or religious beliefs’ and thus covered ‘any manifestation of such beliefs without distinction’. The rule was treating all workers the same and there was no evidence that the rule was applied differently to Ms Achbita.⁵ According to the CJEU, in *Bougnaoui*, it was not clear whether the referred question was based on a finding of a direct or indirect discrimination but that it was for the referring court to decide whether the dismissal was directly or indirectly discriminatory. The CJEU referred to *Achbita* here.⁶

Although the CJEU stated in both cases that it was up to the national court to decide whether there was direct or indirect discrimination, it did give guidance in *Achbita* on how to deal with indirect discrimination. Article 2(2)(b)(i) of Directive 2000/78/EC determines that indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The CJEU held that a neutrality policy was a legitimate aim as it was part of the freedom to conduct a business, guaranteed by Article 16 of the Charter of Fundamental Rights of the EU (EUCFR).⁷

The CJEU then considered whether the ban on visible political, philosophical or religious symbols was appropriate and necessary and held that this was the case: as long as the ban was genuinely pursued in a consistent and systematic manner and thus did not make a distinction between different religions or different (religious, philosophical or political) beliefs; as long as the rule was limited to customer-facing employees; and, as long as the employer had considered whether the employee could be moved to a job without contact with customers.⁸ In *Bougnaoui*, the CJEU held that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement,⁹ and this decision

⁴ Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4 S*, EUC:2016:38; Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, EU:C:2016:553.

⁵ Case C-157/15 *Achbita v. G4 S*, paras. 30-32.

⁶ Case C-188/15 *Bougnaoui v. Micropole*, paras. 31-32.

⁷ Case C-157/15 *Achbita v G4 S*, paras. 37-38.

⁸ *Ibid.*, paras 40-43.

⁹ Case C-188/15 *Bougnaoui v Micropole*, paras. 40-41.

was generally welcomed by commentators.¹⁰ Loenen, for example, writes that it ‘seems a convincing reasoning, as it appears hard to argue that the wearing of the headscarf interferes with the professional performance of Bougnaoui as an IT-engineer’.¹¹

However, the two decisions were strongly criticised for three main reasons. First, the CJEU’s easy acceptance of neutrality as a legitimate aim which can justify indirect discrimination was criticised because the CJEU did not explain in any detail why this was so, especially considering the fact that both cases concerned private employers. A duty of neutrality might be accepted for employees of public authorities, but ‘extending it to the private sector is a big leap’.¹² Jolly points out that the CJEU ‘failed to consider the correlation between the freedom to run a business and the prohibition on running that business ... in a discriminatory manner’ and that the CJEU ‘also did not mention the right to working conditions which respect the individual’s dignity (art.31 of the Charter)’.¹³ Moreover, there is also a tension between the judgment in *Bougnaoui* that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement and the acceptance, in *Achbita*, that the aim of neutrality can be a legitimate aim. Why would an employer have a neutrality policy if it was not for the (anticipated) wishes of customers?

The second point of criticism is that the CJEU did not appear to apply a very strict necessity and proportionality test. It did not balance the needs of the employer with the disadvantages of the neutrality rule for the employee and her right to freely manifest her religion as guaranteed by Article 10 EUCFR. The CJEU indicated that a neutrality policy would be justified: if it was genuinely, consistently and systematically pursued; and, if it was restricted to employees in customer-facing roles. Restricting bans to employees who come into contact with customers appears to be based on the presumption that customers, when faced with an employee wearing a political, philosophical or religious symbol, would attribute the convictions expressed through these symbols to the employer. However, there was no concrete evidence before the CJEU that this actually happens in practice and the CJEU did not seem to require such evidence either.¹⁴ Moreover, as Bell writes, ‘it would surely be

¹⁰ See the writers mentioned in footnote 2.

¹¹ T. Loenen, 10, 2 *REAL* (2017) p. 64.

¹² E. Brems, *European Court of Justice Allows Bans on Religious Dress in the Workplace*, 26 March 2017: <https://blog-iacl-aicd.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace>.

¹³ S. Jolly, 3 *EHRLR* (2017) p. 312.

¹⁴ *Ibid.*, p. 313.

firmly rejected if an employer sought to place other groups vulnerable to discrimination in job roles that avoided contact with customers'.¹⁵

This weak neutrality and proportionality test, as set out by the CJEU, 'still leaves a very large group of workers exposed to the negative effects of a ban on religious clothing or symbols'.¹⁶ It does not promote equality for minority groups, according to Vickers, and has the effect of restricting not only employment opportunities but also broader inclusion, thereby creating invisibility for religious minorities.¹⁷

A third point of criticism is that the CJEU appears to leave the Member States a certain level of discretion in deciding how to regulate the wearing of religious symbols in employment, but that it does not give any indication how far this discretion goes.¹⁸ In her opinion in *Achbita*, Advocate General Kokott argued for giving a measure of discretion to national authorities and courts in applying the proportionality test because the CJEU did not necessarily have to prescribe a solution that is uniform throughout the EU.¹⁹ However, this would mean that the protection against religion or belief discrimination in EU law is not as strong as the protection against other forms of discrimination. Vickers points out that 'it would seem inconceivable that a court would allow a state to argue that national traditions should be allowed to justify sex or race discrimination in employment' and thus that 'it is questionable whether such reasoning should be accepted in the different context of religion'.²⁰

Accepting different, lower standards for the justification of religious discrimination also goes against previous case law of the CJEU which has consistently held that exceptions to the principle of equal treatment must be interpreted strictly.²¹ Moreover, in *Bilka Kaufhaus*, the

¹⁵ M. Bell, 17, 4 *HRLR* (2017) p. 796.

¹⁶ T. Loenen, 10, 2 *REAL* (2017) p. 67; in the same vein: E. Relano Pastor, in Belavusau and Henrard (2019) p. 197.

¹⁷ L. Vickers, 8, 2 *ELLJ* (2017) p. 252.

¹⁸ E. Howard, 24, 3 *MJ* (2017) pp. 360-362; T. Loenen, 10, 2 *REAL* (2017) pp. 66-67; L. Vickers, 8, 2 *ELLJ* (2017) pp. 244-247, 249.

¹⁹ Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4 S*, para. 99.

²⁰ L. Vickers, *The Role of Choice; and the Margin of Appreciation*, 8 September 2016: <https://strasbourgobservers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/>. See also: E. Relano Pastor, in Belavusau and Henrard (2019) pp. 189-90

²¹ See, for example: Case C-222/83 *Johnston v. Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, para. 36; Case C-273/97 *Sirdar v. the Army Board and Secretary of State for Defence* EU:C:1999:523, para. 23; Case C-285/98 *Kreil v. Bundesrepublik Germany* EU:C:2000:02, para. 20, (all three concerned sex discrimination); Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* EU:C:2010:4, para. 60; Case C-447/09 *Prigge and Others v. Deutsche Lufthansa AG* EU:C:2011:573, paras. 56 and 72 (both concerned age discrimination). The latter two cases concerned Articles

CJEU explained the three parts of the justification test for indirect sex discrimination: the means chosen must correspond to a real need; they must be appropriate to achieving the objective pursued; and, they must be necessary to that end.²² The application of the justification and proportionality test in *Achbita* can be criticised for not strictly following any of these three requirements, as is clear from the above.

There were other points of criticism. For example, some commentators agreed with the CJEU in *Achbita*, that there was no direct discrimination, while others argued very strongly that there was direct discrimination.²³ This is discussed below.

§3. Preliminary references

IX v. Wabe e.V.,²⁴ concerned a Muslim woman employee of a company running a number of nurseries, who, when returning from parental leave, was asked no longer to wear a headscarf. During the employee's leave, the company had introduced a neutrality policy prescribing that employees refrain from wearing any visible signs of political, ideological or religious beliefs. The employee refused to remove her headscarf and, after two official warnings, was released from work. The company rules were accompanied by guidance which stated that the wearing of Christian crosses, Jewish skullcaps and Muslim headscarves was not allowed. The company's neutrality policy did not apply to those employees who did not come into contact with customers.²⁵

The *Arbeitsgericht* Hamburg asked the CJEU, first, whether this unilateral neutrality policy constituted direct religion or belief discrimination contrary to Directive 2000/78/EC against employees who follow certain clothing rules for religious reasons. The second question asked whether the policy constituted indirect discrimination on the grounds of religion and/or gender against a female employee who, due to her Muslim faith, wears a headscarf. Under this second question, the *Arbeitsgericht* Hamburg asked, in particular whether discrimination on the grounds of religion and/or gender can be justified with the employer's subjective wish

2(5) and 4(1) of Directive 2000/78/EC. A discussion of the question whether this also applies to the exception in Article 6(1) which allows for justification of direct discrimination on the ground of age, goes beyond the subject of this article.

²² Case C- 170/84 *Bilka Kaufhaus v. Karin Weber von Harz* EU:C:1986:204, para. 36

²³ See: E. Howard, 24, 3 *MJ* (2017) pp. 351-354 and the literature referred to there.

²⁴ Case C-804/18 *IX v. Wabe e.V.*. For the reference decision (in German) see *Arbeitsgericht* (Labour Court) Hamburg 8. Kammer, EUGH-Vorlage vom 21.11.2018, 8 CA 123/18: <http://www.rechtsprechung-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE190001061&st=ent> In the following all translations by author.

²⁵ *Arbeitsgericht* Hamburg.

to pursue a policy of political, ideological and religious neutrality even where the employer thereby seeks to meet the subjective wishes of his customers. And, the last question was:

Do Directive 2000/78/EC and/or the fundamental right of freedom to conduct a business under Article 16 of the Charter of Fundamental Rights of the European Union in view of Article 8(1) of Directive 2000/78/EC preclude a national regulation according to which, in order to protect the fundamental right of freedom of religion, a ban on religious clothing may be justified not simply on the basis of an abstract capacity to endanger the neutrality of the employer, but only on the basis of a sufficiently specific risk, in particular of a specifically threatened economic disadvantage for the employer or an affected third party?

In *MH Müller Handels GmbH v. MJ*,²⁶ Müller, a company which runs a number of chemist shops, employed MJ, a Muslim woman, since 2002. She had not worn a headscarf at work before she went on parental leave. On her return from this leave, she wore a headscarf and her employer asked her to take this off as it was against the company rules. She refused and then did not get work. On 21 June 2016, she was again asked to take her headscarf off and, when she refused, she was sent home. In July 2016, she received instructions from her employer to come to work without any prominent and large-scale signs of religious, philosophical and political convictions. This rule applied to all shops and aimed to preserve neutrality and avoid conflicts between employees. MJ requested the courts in first and second instance to declare the instruction invalid which they did.²⁷ The *Bundesarbeitsgericht* (the highest federal court in labour matters in Germany) asked the CJEU, first, whether indirect discrimination on grounds of religion could be justifiable only if an employer's policy prohibited all visible sign of religious, political and philosophical belief rather than such signs which are prominent and large scale. If this first question was answered in the negative, the *Bundesarbeitsgericht* asked a second question: whether, in determining if the rule in question here is justifiable, the right to freedom of religion as guaranteed in Article 10 EUCFR and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) may be taken into account; and, whether national rules of constitutional status which protect freedom of religion may be taken into account as more favourable

²⁶ Case C-341/19 *MH Müller Handels GmbH v. MJ*. For the decision of the Bundesarbeitsgericht (in Dutch) see: https://ecer.minbuza.nl/documents/20142/0/C-341-19+verwijzingsbeschikking_Redacted.pdf/46dff96f-605c-9311-c299-50e9a1ce2a4e?t=1561725088198 In the following all translations by author.

²⁷ *Bundesarbeitsgericht*.

provisions within the meaning of Article 8(1) of Directive 2000/78/EC. If both of these could not be taken into account, the *Bundesarbeitsgericht* asked whether ‘national rules of constitutional status which protect freedom of religion be set aside because of primary EU law, even if primary EU law, such as, for example, Article 16 of the Charter of Fundamental Rights, recognises national laws and practices’.

It will be clear that the questions referred to the CJEU in these two cases can be linked to the three main reasons for criticising the decisions in *Achbita* and *Bougnaoui* mentioned above. It is argued here that the CJEU is asked to deal with these points of criticism and to clarify the issues it left open in the earlier judgments. These questions will be analysed under a number of headings.

§4. Direct discrimination

Direct discrimination on the ground of religion or belief takes place where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion or belief.²⁸ In *Achbita*, the CJEU held that there was no direct discrimination because G4 S’s internal rule banned all visible signs of political, philosophical or religious beliefs and applied to all employees in the same way.²⁹ However, not everyone agreed with the CJEU that there was no direct discrimination. The two Advocates General, in *Achbita* and *Bougnaoui*, came to different conclusions, as did some of the interveners and commentators, so an argument could certainly have been made for a finding of direct discrimination in these cases.³⁰

The *Arbeitsgericht* Hamburg stated that it considered that there was direct discrimination under both Directive 2000/78/EC and the German *Allgemeine Gleichbehandlungsgesetz* (AGG, General Equal Treatment Law), when there was a direct link with a protected characteristic; while indirect discrimination occurred where an apparently neutral rule affected more people of a certain group. The latter did not apply here, as the rule explicitly referred to the characteristic of religion by prohibiting religious signs. The employee in question would have been treated differently if she had not been religious and had not wanted to express her religion or if she had wanted to wear a headscarf not for religious reasons but for reasons of fashion. Therefore, the neutrality policy has an explicitly negative effect linked

²⁸ Article 2(2)(a) of Directive 2000/78/EC.

²⁹ Case C-157/15, *Achbita v. G4 S*, paras. 30-32.

³⁰ See: E. Howard, 24, 3 *MJ* (2017) pp. 351-354 and the literature referred to there.

to the characteristic of religion.³¹ In this, the *Arbeitsgericht* follows the decision of the CJEU in *CHEZ*, where the CJEU clarified the difference between direct and indirect discrimination: there is direct discrimination when the discrimination ground determines the decision for the less favourable treatment or, in other words, where the less favourable treatment is by reason of that ground; while indirect discrimination considers the effect of a measure, which is ‘ostensibly’ neutral or neutral ‘at first glance’.³²

The *Arbeitsgericht* Hamburg continued that the difference between direct and indirect discrimination could not be determined by the question whether people with other (protected or unprotected) characteristics were treated similarly badly, but only by the question whether the unfavourable treatment was explicitly linked to a protected characteristic. For direct discrimination, what is decisive is whether the person, who is affected by the treatment, suffers disadvantage because of her religion. Direct religious discrimination does not become indirect discrimination because non-religious people are also bound by the rule. If this was the case, then this would lead to the conclusion that a general animosity to all religions would be considered neutral.³³

The *Arbeitsgericht* refers, among others, to Hennette-Vaucher. She actually calls the reasoning of the CJEU in *Achbita* ‘really perverse, in the sense that it amounts to considering that if you discriminate against all members of a group, you actually, no longer are discriminating at all’.³⁴ Brems draws a parallel with disability as a protected characteristic and writes that it would be unthinkable that the CJEU would accept that a measure excluding all disabled people would not constitute direct disability discrimination.³⁵ The *Arbeitsgericht* is, therefore, of the opinion that there is direct discrimination in this case and it is submitted that the arguments leading to this conclusion are quite convincing. However, the *Arbeitsgericht* feels that the judgment in *Achbita* prevents it from accepting this and thus it asks the CJEU whether there is direct discrimination.³⁶

³¹ Case C-804/18 *IX v. Wabe e.V.*, paras. 78-82.

³² Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480, para. 109.

³³ *Ibid.*, paras. 83-84.

³⁴ S. Hennette-Vaucher, 13 *ECLR* (2017) pp. 748. In the same vein: E. Brems (2017); E. Spaventa, ‘What is the point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case’, *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html>.

³⁵ E. Brems (2017).

³⁶ Case C-804/18 *IX v. Wabe e.V.*, paras. 85-86.

That opinions are divided regarding the question whether a rule prohibiting all visible signs of religious, political and philosophical convictions constitutes direct or indirect discrimination is also clear from the fact that, in *MJ*, the *Bundesarbeitsgericht* never mentioned direct discrimination but expressed the opinion that the contested rule was indirectly discriminatory for Ms MJ, because the general prohibition affected her more than other people because of her religion.³⁷

The distinction between direct and indirect discrimination is important because, under Directive 2000/78/EC, direct religion or belief discrimination cannot be justified except in situations prescribed by the Directive, and, in relation to the employer's policies as discussed in this article, the only relevant justification is the provision for genuine and determining occupational requirements. In contrast, indirect discrimination can be justified by a legitimate aim and the use of proportionate means to achieve that aim. Indirect discrimination will be examined next.

§5. Indirect discrimination – grounds

The *Arbeitsgericht* Hamburg, in its second question, asks whether the neutrality policy in question constituted indirect discrimination on the grounds of religion and/or gender against a female employee who, due to her Muslim faith, wears a headscarf. The possibility that such bans constituted (indirect) gender discrimination was not mentioned by the CJEU in either *Achbita* or *Bougnaoui*. In her opinion in *Achbita*, Advocate General Kokott considered that the ban at issue applied to all religious symbols without distinction and, thus, that there was no discrimination ‘*between religions*’ [her italics]. She continued that the rule ‘is *not* one directed specifically against employees of Muslim faith, let alone specifically against *female* employees of that religion’; and she pointed out that it would affect Jewish men wearing skullcaps, Sikh men wearing turbans and Christian employees who wanted to wear a clearly visible cross.³⁸ In *Bougnaoui*, Advocate General Sharpston stated that the issues that arise ‘do not relate to the Islamic faith or to members of the female sex alone’.³⁹ Therefore, both Advocates General rejected the argument that the bans were discriminatory on the grounds of gender.

³⁷ Case C-341/19 *MH Müller Handels GmbH v. MJ*, para. 20.

³⁸ Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4 S*, para. 49.

³⁹ Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 30.

In *IX*, the applicant claimed that the policy constituted discrimination on the grounds of gender and ethnic origin. The prohibition was, according to her, aimed at headscarves and thus only concerns women, so it is gender discrimination. And it concerns a larger proportion of women with a migrant background, and thus it is discriminatory on the grounds of ethnic origin.⁴⁰ However, the *Arbeitsgericht* did not mention discrimination on the grounds of ethnic origin in the reference.

The *Arbeitsgericht* Hamburg argues that the prohibition on religious symbols affects some religions more than others: Muslim women who want to wear a headscarf and Jewish men who wear a skullcap are prohibited from doing so, but Christians can wear a cross as they can wear this under their clothing. The court also points out that Jewish women who wear a wig for religious reasons can do so because a wig is usually not recognisable as such. Statistically, the rule in this case affects almost exclusively Muslim women, according to the *Arbeitsgericht*, because the majority of employees in nurseries are female and the number of Jewish male employees is negligible.⁴¹

Blair writes that ‘the dress requirements of males from ethnic minority groups (Sikhs apart) have seldom caused problems. Women much more than men are subject to highly restricted dress codes’.⁴² And, McColgan writes: ‘the impact of any restriction on the visible manifestation of religious belief is felt disproportionately by women who are forced to choose between adherence to religious obligation and the pursuit of education or economic empowerment through work’.⁴³ Therefore, such bans generally affect women more than men, and, following the CJEU in *Bilka Kaufhaus*, they would be indirectly discriminatory on the ground of gender unless objectively justified.⁴⁴ The argument that bans on religious symbols constitute gender discrimination or discrimination on a combination of gender, ethnic and/or religious grounds has also been brought forward in the literature.⁴⁵ However, claiming

⁴⁰ Case C-804/18 *IX v. Wabe e.V.*, para. 23.

⁴¹ *Ibid.*, para. 92.

⁴² A. Blair, ‘Case Commentary: R (SB) v Headteacher and Governors of Denbigh High School – Human Rights and Religious Dress in Schools’, 17, 3 *Child and Family Law Quarterly* (2005) 399-413, p. 411.

⁴³ A. McColgan, ‘Class Wars? Religion and (In)equality in the Workplace’, 38, 1 *Industrial Law Journal* (2009) p. 18.

⁴⁴ Case C-170/84 *Bilka Kaufhaus*.

⁴⁵ See, for example: T. Loenen, ‘The Headscarf Debate: Approaching the Intersection of Sex, religion, and Race under the European Convention on Human Rights and EU Equality Law’, in D. Schiek and V. Chege (eds) *European Union Non-discrimination Law Comparative Perspectives on Multidimensional Equality Law* (Routledge–Cavendish, 2009), pp. 313-328; L. Roseberry, ‘Religion, Ethnicity and Gender in the Danish headscarf Debate’, in *ibid.*, pp. 329-351; U. Sacksofsky, ‘Religion and Equality in Germany - the Headscarf Debate from a Constitutional Perspective’, in *ibid.*, pp. 353-370; F. Ast and R. Spielhaus, ‘Tackling Double

discrimination on a combination of grounds might be difficult, unless, in this case, either religious discrimination or gender discrimination can be proven. In *Parris*, where discrimination on the grounds of age and sexual orientation or on a combination of these grounds was claimed, the CJEU held that there was no sexual orientation discrimination; no age discrimination; and, while recognising that discrimination may be based on several grounds, it held that no new category of discrimination could exist where discrimination on either one of the grounds had not been established.⁴⁶

It has also been pointed out frequently that such bans are linked to prejudice against and stereotypes of Muslim women.⁴⁷ In fact, the latter was used as an argument for accepting that there was direct discrimination in this case.⁴⁸

Based on the above, it is submitted that the first two questions of the *Arbeitsgericht Hamburg* are pertinent: there are arguments for accepting that there is direct religion or belief discrimination; and, if the CJEU does not find direct discrimination, for accepting indirect discrimination on the grounds of religion or belief and/or gender.

§6. Indirect discrimination – legitimate aim

According to Article 2(2)(b) of Directive 2000/78/EC, indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In *Achbita*, the CJEU held, in relation to the legitimate aim, that an employer's neutrality policy was legitimate because it related to the freedom to conduct a business as guaranteed by Article 16 EUCFR, notably where only those workers who are in

Victimization of Muslim Women in Europe: The Intersectional Response', 16, 2 *Mediterranean Journal of Human Rights* (2012) pp. 357-382; E. Relano Pastor, 'Towards Substantive Equality for Religious Believers in the Workplace? Two Supernational European Courts, Two Different Approaches', 5, 2 *Oxford Journal of Law and Religion* (2016) p. 277; T. Loenen, 10, 2 *REAL* (2017) p. 67-68; E. Spaventa, (2017); L. Vickers (2017) p. 253; A. Sledzinska-Simon, 'Unveiling the Culture of Justification in the European Union, Religious Clothing and the Proportionality Review', in U. Belavusau and K. Henrard (2019), 207.

⁴⁶ Case C-443/15 *Parris v. Trinity College Dublin*, ECLI:EU:C:2016:897, paras. 80-81.

⁴⁷ E. Bribosia and I. Rorive, 'ECJ Headscarf Series (4): The Dark Side of Neutrality', *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/14/ecj-headscarf-series-4-the-dark-side-of-neutrality/>; E. Brems, ECJ Headscarf Series (5): The Field in Which Achbita Will Land - A Brief Sketch of Headscarf Persecution in Belgium', *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/16/ecj-headscarf-series-5-the-field-in-which-achbita-will-land-a-brief-sketch-of-headscarf-persecution-in-belgium/>; S. Ouald Chaib, 'ECJ Headscarf Series (6): The Vicious Circle of Prejudice against Muslim Women', *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/20/ecj-headscarf-series-6-the-vicious-circle-of-prejudices-against-muslim-women/>; E. Brems (2017); E. Relano Pastor, in Belavusau and Henrard (2019), p. 197.

⁴⁸ See E. Howard, 24, 3 *MJ* (2017) p. 353-354.

contact with the employer's customers are covered.⁴⁹ The CJEU was, as mentioned above, criticised for not explaining why this was a legitimate aim, especially as in both *Achbita* and *Bougnaoui*, the employers were private employers. The new cases referred to the CJEU similarly concern private employers and, thus, what was said above applies here as well.

The *Arbeitsgericht Hamburg* refers to what the CJEU held in relation to a neutrality policy being a legitimate aim but then queries the relation between this Charter right and the German Constitution.⁵⁰ It then goes on to consider the decision in *Bougnaoui* that the wish of a customer not to be served by a person with a Islamic headscarf is not a genuine and determining occupational requirement, and wonders why it is then allowed to prohibit the same employee to wear a headscarf when the employer makes the wish of the customers their own through a general neutrality policy.⁵¹ This echoes the comments about the tension between the two cases mentioned above. As Loenen writes, the CJEU in *Bougnaoui* clearly stated that subjective feelings from customers who respond negatively to expressions of Islamic belief, 'cannot be a legitimate reason for a headscarf ban. If this is the case more general neutrality policies which proactively play into similar attitudes would seem equally unacceptable'.⁵² In fact, in *IX*, the employer stated that the parents especially appreciated the neutrality policy and that they, without it, would take their children out; and, that the number of applications for places was down.⁵³

Therefore, the neutrality policy in this case was very clearly based on the wishes of the customers of the nursery. Advocate General Sharpston, in *Bougnaoui*, drew attention to:

the insidiousness of the argument 'but we need to do X because otherwise our customers won't like it'. Where the customer's attitude may itself be indicative of prejudice based on one of the 'prohibited factors', such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice. Directive 2000/78 is intended to confer protection in employment against adverse treatment (that is, discrimination) on the basis of one of the prohibited factors. It is not about losing one's job in order to help the employer's profit line.

⁴⁹ Case C-157/15 *Achbita v. G4 S*, para. 37-38.

⁵⁰ Case C-804/18 *IX v. Wabe e.V.*, para. 98.

⁵¹ *Ibid.*, para. 100.

⁵² T. Loenen, 10, 2 *REAL* (2017) p. 66.

⁵³ *Ibid.*, para. 33.

The question can also be raised if the decision in *Achbita* is compatible with what the CJEU held in *Feryn*.⁵⁴ In the latter case, one of the directors of a company installing garage and security doors made a statement on local radio that, although the company was seeking to recruit new employees, they could not employ ‘immigrants’ because customers were reluctant to give them access to their private residences for the duration of the works. The CJEU held that such a statement constituted direct discrimination on the grounds of racial and ethnic origin under Directive 2000/43/EC,⁵⁵ because such a public declaration was clearly likely to dissuade some candidates from applying for jobs with this employer.⁵⁶ It can be argued that a neutrality policy, such as the ones in *IX* and *MJ*, would dissuade some candidates from applying for jobs with these employers and, therefore, constitutes (direct) discrimination. Or, if this argument is not accepted, has the CJEU, with its decisions in *Feryn* and *Achbita*, created higher levels of protection against racial or ethnic origin discrimination than against religion or belief discrimination? It will be clear that the CJEU judgment in *Feryn* can also be used to argue for a finding of direct discrimination in *IX*.

The *Bundesarbeitsgericht* accepts, in line with the CJEU decisions, that a neutrality policy is a legitimate aim.⁵⁷ The employer in this case also argues that the neutrality rule is legitimate, referring to *Achbita*. The employer’s aim in this case is, among others, to prevent conflicts between employees, as such conflicts, based on difference in religion and culture, have happened three times in the past, although none involved the wearing of a headscarf.⁵⁸ In this case, the wish of customers is not mentioned.

§7. Indirect discrimination – necessity and proportionality

If a neutrality policy is a legitimate aim, the next question to consider is whether the means to achieve this aim are proportionate and necessary. In *MJ*, the *Bundesarbeitsgericht* asks whether the policy in this case, which only prohibits prominent and large scale signs of religious, political and philosophical belief, can be justified. This raises the question when is a sign is prominent and large scale? Based on what happened in this case, a headscarf is clearly seen as such. A small Christian cross or star of David on a chain or worn on a lapel

⁵⁴ Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, ECLI:EU:C:2008:397

⁵⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

⁵⁶ Case C-54/07 *Feryn*, para. 25.

⁵⁷ Case C-341/19 *MH Müller Handels GmbH v. MJ*, para. 21.

⁵⁸ *Ibid.*, para. 9-10.

would probably not be prominent and large scale, but what about a Jewish skullcap? A Sikh turban will probably also be seen as a prominent and large scale symbol. It can, therefore, be argued that this rule differentiates between religions. In *Achbita*, the CJEU mentioned that G4 S's neutrality policy covered all manifestations of political, religious and philosophical beliefs without distinction and treated all employees equally.⁵⁹ This led the CJEU to the conclusion that the rule did not constitute direct discrimination. The rule in *MJ*, however, does not cover all manifestations of beliefs equally. This rule differentiates between religions and thus, following the CJEU in *Achbita*, would constitute (direct) religion or belief discrimination and cannot be justified.

The second question referred to the CJEU by the *Bundesarbeitsgericht* asks whether the right to freedom of religion as guaranteed in Article 10 EUCFR and Article 9 ECHR may be taken into account in the decision on justification and proportionality. It is submitted here that not only Article 10, but also other articles of the Charter should be taken into account. There is the already mentioned Article 31 EUCFR, which contains the right of every worker to working conditions which respect their dignity; Article 21, which contains the right to non-discrimination on the ground of, among others, religion and belief; Article 22, which declares that the Union shall respect cultural, religious and linguistic diversity; and, Article 23 which determines that 'equality between men and women must be ensured in all areas, including employment, work and pay'.

This is based on the fact that Directive 2000/78/EC itself, in Recital 1, refers to fundamental rights, as guaranteed by the ECHR, and to the constitutional traditions common to the Member States, as general principles of law. The latter rights have been, as the CJEU mentions in *Achbita*, reaffirmed in the EUCFR.⁶⁰ The adoption of the EUCFR shows the EU commitment to improve the protection of fundamental rights across the Union; and, as Loenen writes, 'to live up to this commitment one would expect the CJEU to strive as a matter of general principle for a high level of protection of the rights and freedom of workers, including their religious freedom'.⁶¹ This also includes their rights under Articles 21, 22, 23 and 31 EUCFR.

⁵⁹ Case C-157/15, *Achbita v. G4 S*, para. 30.

⁶⁰ *Ibid.*, paras. 26-27.

⁶¹ T. Loenen, 10, 2 *REAL* (2017) p. 71

The CJEU has consistently held that exceptions to the right to equal treatment must be interpreted restrictively, as mentioned above, and this also suggests that the rights of employees to equal treatment must weigh heavily in the proportionality test. This is further supported by the fact that the CJEU has generally given a purposive and expansive interpretation to the EU provisions against discrimination and has, through this interpretation, increased the protection for victims of discrimination, although there are three exceptions to this: *Parris* (in relation to discrimination on a combination of grounds), *Achbita* and *Bougnaoui* (both in relation to religion or belief).⁶²

More support for the argument that all applicable articles of the EUCFR must be taken into account in the proportionality test can be found in the three part test established in *Bilka Kaufhaus*, referred to above. This test includes that the means chosen to achieve the legitimate aim pursued must be necessary to that end.⁶³ A measure is not necessary if there are alternative ways to achieve the same aim, which are less discriminatory, less of an infringement on the principle of equal treatment.⁶⁴ This is underpinned by the case law of the CJEU.⁶⁵ For example, in *Lommers*, the CJEU stated that the principle of proportionality ‘requires ...that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued’.⁶⁶ And, in *Léger*, the CJEU held that the proportionality test implies that, ‘when there is a choice between several appropriate measures, recourse must be had to the least onerous among them’.⁶⁷

Sledzinska-Simon writes that the proportionality test typically includes three questions.⁶⁸ First, ‘whether there was a rational connection between the aim and the means’ (which author refers to as ‘suitability’). The second question is ‘whether the impairment of the right was minimal, and there are no alternative, less impairing means that would serve the aim equally

⁶² Case C-443/15 *Parris*; Case C-157/15, *Achbita v. G4 S*; Case C-188/15 *Bougnaoui v Micropole*. For more on this argument see: E. Howard, ‘EU Anti-discrimination Law: Has the CJEU stopped Moving Forward?’, 18, 2-3 *International Journal of Discrimination and the Law* (2018) 60-81.

⁶³ Case C-170/84 *Bilka Kaufhaus*, para. 36

⁶⁴ See on this, D. Schiek, ‘Indirect Discrimination’, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), p. 357; S. Haverkort-Speekenbrink, *European Non-Discrimination Law - A Comparison of EU law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012), p. 76; L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Bloomsbury, 2016), p. 66.

⁶⁵ Case C-222/83 *Johnston*, para. 38; Case C-273/97 *Sirdar*, para. 26; Case C-285/98 *Kreil*, para. 23; Case C-476/99, *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2002:183, para. 39.

⁶⁶ Case C-476/99, *Lommers*, para. 39.

⁶⁷ Case C-528/13 *Léger v. Ministre des Affaires Sociales, de la Santé et des Droits des Femmes, Établissement Français du Sang*, EU:C:2015:288, para. 58.,

⁶⁸ A. Sledzinska-Simon, in Belavusau and Henrard (2019) p. 210.

well (necessity)’. This corresponds to the third part of the test in *Bilka Kaufhaus* and confirms what was stated above. And, the third question, according to Sledzinska-Simon is ‘whether a fair balance has been struck between the benefit of achieving the aim and the harm resulting from the infringement of the right’.⁶⁹ According to Sledzinska-Simon, the CJEU uses this proportionality test in cases concerning discrimination.⁷⁰ In relation to *Achbita*, she writes that ‘clearly, the court [CJEU] failed to engage in a meaningful proportionality analysis that should be at the heart of a fundamental rights case such as that at hand’.⁷¹ And, Brems writes that the CJEU ‘does not even mention the applicant’s religious freedom or the importance of the headscarf for her’. She continues that ‘it is hard to accept that the ECJ [CJEU] has genuinely conducted a proportionality assessment if the judgment does not show any evidence of the weight that is attributed to the interests on one side of the balance’.⁷²

All this very clearly indicates that, in deciding on proportionality, the interests of the individual and their rights must be weighed in the balance. There appears to be no reason to limit this to the right not to be discriminated against under the EU anti-discrimination directives. All rights of both parties should be weighed in the balance and the right of the employer under Article 16 EUCFR, which the CJEU took into account in *Achbita*, should be balanced against the employee’s rights under the EUCFR: the right to freedom of religion (Article 10), the right to be free from discrimination on the grounds of religion or belief (Article 21) and the right to dignity at work (Article 31). Moreover, Articles 22 and 23 should also be taken into account. Only by doing this can the CJEU ensure ‘that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued’, as mentioned in *Lommers*.⁷³

Advocate General Sharpston, in *Bougnaoui*, states that reconciling the employee’s freedom to manifest their religion – ‘whose scope and possible limitation in the employment context are at the heart of the proceedings before the national court’ – and the employer’s right to conduct his business will require ‘a delicate balancing act between two competing rights’.⁷⁴ In her assessment of the proportionality, Sharpston states that ‘the starting point for any analysis must be that an employee has, in principle, the right to wear religious apparel or a

⁶⁹ Ibid.

⁷⁰ Ibid., p. 212.

⁷¹ Ibid., p. 223.

⁷² Brems (2017).

⁷³ Case C-476/99, *Lommers*, para. 39.

⁷⁴ Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 73.

religious sign but that the employer also has, or may have, the right to impose restrictions'.⁷⁵ This also supports the argument that the right to freely manifest one's religion in Article 10 EUCFR must be taken into account. And, if this Charter right is considered, then all rights in the Charter applicable to a case should be weighed in the balance.

§7. Status national constitutional norms and Article 8 Directive 2000/78/EC

The German Constitution guarantees, in Article 4, freedom of religion. Restrictions on this right can be justified under certain circumstances. However, this cannot simply be justified on the basis of an abstract capacity to endanger the neutrality of the employer, but only on the basis of a sufficiently specific risk, in particular of a specifically threatened economic disadvantage for the employer or an affected third party, as is clear from one of the referred questions in *IX*.⁷⁶

The last question of the *Arbeitsgericht* Hamburg and the two final questions of the *Bundesarbeitsgericht* concern Article 8(1) of Directive 2000/78/EC, which determines that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive. More specifically, both referring courts question whether national constitutional guarantees of the right to freedom of religion can offer more protection or if these guarantees should be set aside because of primary EU law, like Article 16 EUCFR, even if such law recognises national law and practices.⁷⁷

According to Loenen, the rulings in *Achbita* and *Bougnaoui* allow for different interpretations. On the one hand, an interpretation is possible which reads that the decisions allow headscarf bans under certain conditions. On the other hand, 'an interpretation is possible which reads the conditions mentioned as minimum requirements only, leaving a fuller and strict assessment of the headscarf ban to the national level'.⁷⁸

⁷⁵ Ibid., para. 122. Although Sharpston discusses proportionality in relation to Article 4(1) of Directive 2000/78/EC, the same can be said to apply to the justification and proportionality test for indirect discrimination in Article 2(2)(b), as both require a legitimate aim and proportionate means to achieve that aim,

⁷⁶ Case C-804/18 *IX v. Wabe e.V.*, question 2(b).

⁷⁷ Article 16 EUCFR determines that: the freedom to conduct a business in accordance with Community law and national law and practices is recognised.

⁷⁸ T. Loenen, 10, 2 *REAL* (2017) p. 69. Author does not expand on this.

Spaventa also refers to the fact that Directive 2000/78/EC intends to set only minimum standards and that the Member States can provide more protection.⁷⁹ She writes that ‘in theory then, the *Achbita* ruling should not be seen as the last word in relation to the treatment of religious people at work’; and, that Member States can pass legislation to prohibit private employers from requiring religious neutrality from employees. However, Spaventa continues that things are slightly more complicated in the EU context. ‘In particular there is nothing in the [*Achbita*] ruling to indicate that the Directive sets only minimum standards’, so that it would be open to the Member States to go further in protecting people holding religious beliefs.⁸⁰ According to Spaventa, the reference to the Charter ‘is important because, in the EU context, when the Charter applies it sets the fundamental rights standard’. This means that Member States wishing to provide more extensive protection against religious discrimination, ‘might be prevented from doing so since, pursuant the *Achbita* ruling, it would infringe the right to conduct a business as protected by the Charter’. The CJEU ‘sets the standard – employers have a fundamental right, albeit with some limitations, to limit the employees’ right not to be discriminated against’. Spaventa asks then ‘what is the point of minimum harmonization directives if the upward discretion of the member States is so curtailed’?⁸¹ Author refers to *Alemo Herron* where the CJEU held that:

Article 3 of Directive 2001/23, read in conjunction with Article 8 of that directive [allowing Member States to provide more extensive protection], cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business.⁸²

Cloots expresses a similar view where she writes that ‘following the CJEU’s *Melloni*-doctrine,⁸³ national authorities and courts will no longer be free to apply higher national standards of rights protection to similar headscarf cases, for doing so would compromise “the primacy, unity and effectiveness of EU law”’.⁸⁴ She continues: ‘nor could a national judge subject such a corporate dress code to a more stringent proportionality review. The CJEU has determined the correct balance between non-discrimination and the freedom to conduct a

⁷⁹ E. Spaventa (2017).

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Case C-426/11 *Alemo Herron and Others v. Parkwood Leisure Ltd*, EU:C:2013:521, para. 36.

⁸³ Case C-399/11 *Melloni v. Ministerio Fiscal*, EU:C:2013:107.

⁸⁴ E. Cloots, ‘The CJEU’s Headscarf Decision: *Melloni* Behind the Veil?’ *Verfassungblog* (2016), <https://verfassungsblog.de/the-cjeus-headscarf-decisions-melloni-behind-the-veil/>.

business for the entire Union’.⁸⁵ In *Melloni*, the CJEU had to interpret Article 53 EUCFR, which determines that:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

In *Melloni*, the CJEU rejected the interpretation of Article 53 EUCFR by the national court because that would allow Member States ‘to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law’.⁸⁶ This interpretation, according to the CJEU, would undermine the principle of primacy of EU law because ‘it would allow a member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution’.⁸⁷ The CJEU then held that:

It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.⁸⁸

Cloots suggests that this and the CJEU judgments in *Achbita* and *Bougnaoui* mean that Member States cannot provide more protection against religious discrimination and this is supported by Spaventa. However, Loenen appears to say that the judgments can be interpreted in such a way that Member States can provide more protection.

The judgments have led to reactions in different Member States which also show some uncertainty over their meaning. For example, in Sweden, the effect of the cases, that Article 16 EUCFR sets a maximum protection level, was seen as reducing the protection level which

⁸⁵ Ibid.

⁸⁶ Case C-399/11 *Melloni*, paras. 56-57.

⁸⁷ Ibid., para. 58

⁸⁸ Ibid. para. 60.

would otherwise have applied under the Swedish Discrimination Act, at least with regard to private employers.⁸⁹ On the other hand, in the UK, an urgent commons question was asked in Parliament on the day after the decisions had been delivered about the implications for the UK. Concerns were raised as to the compatibility of the judgments with the European Court of Human Rights (ECtHR) judgment in *Eweida and Others v the United Kingdom*.⁹⁰ The Parliamentary Undersecretary of State for Women and Equality replied that the two cases were compatible; that ‘the law is clear and remains unchanged’; and, that ‘the Government did not want employers mistakenly thinking that the rulings gave them any authority to sack public-facing staff who wore headscarves or any other religious symbols’.⁹¹ Therefore, Sweden appears to explain the judgments in the same way as Cloots and Spaventa do, but the UK seems to interpret the judgments as leaving room for more favourable provisions in national law.

Elsewhere, Spaventa explains that *Melloni* means that ‘national courts are prevented from imposing their own constitutional standards in those cases in which to do so would affect the uniform application of EU law, that is, when EU law leaves no discretion to Member States’.⁹² She continues that ‘when EU law leaves space for the exercise of discretion by national authorities, the Charter only provides Member States with a floor of rights leaving national authorities (and national courts) the freedom to apply their own (higher and differing) standards’.⁹³ And, according to Besselink,

If there is sufficient discretion for Member States in the implementation of EU law - or if EU law otherwise allows for diversity - primacy, unity and effectiveness are not at stake. Such discretion and diversity exist when a directive can be implemented in

⁸⁹ E. Howard, *Religious Clothing and Symbols in Employment. A Legal Analysis of the Situation in the EU Member States*, European Network of Legal Experts in Gender Equality and Non-discrimination, European Commission, Directorate General for Justice and Consumers (2017), p. 78, http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=608849

⁹⁰ Ibid, p. 78-79. ECtHR, *Eweida and Others v. the United Kingdom*, Judgment of 15 January 2013, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10. This is discussed in more detail below.

⁹¹ See: F. Cranmer, ‘Urgent Commons Question on CJEU Rulings in Achbita and Bougnaoui’, *Law & Religion UK* (2017), <http://www.lawandreligionuk.com/2017/03/15/urgent-commons-question-on-cjeu-rulings-in-achbita-and-bougnaoui/>.

⁹² E. Spaventa, ‘Fundamental Rights in the European Union’, in C. Barnard and S. Peers (eds) *European Union Law* (2nd ed., Oxford University Press, 2017), p. 249.

⁹³ Ibid., p. 249-250.

various ways, such as in cases of minimum harmonisation, or explicit references to national standards.⁹⁴

As mentioned, Article 16 EUCFR makes explicit reference to national law and practices. And, according to Article 288 Treaty on the Functioning of the European Union (TFEU), Directives are binding as to the result to be achieved but leave the national authorities the choice of form and method. Therefore, all Directives leave some discretion to the Member States, but is this enough to apply the above? In particular, does Directive 2000/78/EC leave enough discretion to the Member States to allow them the freedom to apply their own higher standards? *Alemo Herron*, mentioned above, suggests that the clause in Article 8(1) of Directive 2000/78/EC is not enough. It will ultimately be up to the CJEU to give a definite answer to this question. Whether it will do so in these new headscarf cases remains to be seen as the CJEU might not need to address this question depending on its reply to the other referred questions.

In addition, the answer to this question is not very important for the argument made here, which is that the CJEU itself, in *Achbita*, should have used a more thorough proportionality test to establish whether the discrimination was justified. It was submitted that the CJEU should have taken account not only the employer's freedom to conduct a business under Article 16 EUCFR, but also of the Charter rights which protect the employee's freedom to manifest their religion, their right to be free from discrimination and their right to working conditions which respect their dignity.

Article 10 EUCFR corresponds to Article 9 ECHR and thus, according to Article 52(3) EUCFR, this right must be given the same meaning and scope as the Convention right. According to the Explanations on Article 52(3), this includes the limitations to the rights as authorised by the Convention; and, this reference to the ECHR covers both the text and the Protocols to it and the case law of both the ECtHR and the CJEU.⁹⁵ Therefore, the case law of the ECtHR on Article 10 should be taken into account by the CJEU. In *Eweida and Others*, mentioned above, a British Airways employee complained that the prohibition to wear a small cross at work as a manifestation of her belief was a violation of her right under Article 9 ECHR. The ECtHR accepted the employer's wish to promote a neutral image as a

⁹⁴ L. Besselink, 'The Parameters of Constitutional Conflict after Melloni', 39, 4 *European Law Review* (2014) p. 546.

⁹⁵ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/33.

legitimate aim, but then concluded that ‘there was no evidence that the wearing of other, previously authorised, items of religious clothing by other employees had any negative impact on the employer’s brand or image. And, because there was no evidence of any real encroachment on the interests of others, the ECtHR found that Eweida’s freedom of religion was violated and that the interference was not justified.’⁹⁶ This suggests that the ECtHR is of the opinion that an employer’s neutrality policy in relation to clothing can only be justified if there is concrete evidence that not having one threatens the employer’s interests. It is submitted here that the CJEU should follow this and require that the employers in *IX* and *MJ* provide evidence of a concrete threat to their interests. This comes close to the requirement in the German Constitution that there needs to be evidence of a sufficiently specific risk to the employer.

§8. Conclusion

Two preliminary references relating to the wearing of Islamic headscarves at work - *IX* and *MJ* - have been made to the CJEU⁹⁷ and, therefore, that Court will get another opportunity to interpret and clarify the EU provisions against religion and belief discrimination. The CJEU has decided two cases – *Achbita* and *Bougnaoui* - regarding this issue in 2017⁹⁸ and the judgments in these cases were criticised for a number of reasons: the CJEU’s easy acceptance of neutrality as a legitimate aim for justification of indirect discrimination, especially where it concerned private employers, and the role played by the wishes of customers in adopting a neutrality policy; the lack of rigour in applying the proportionality test; and, the uncertainty of the level of discretion left to the Member States to regulate the wearing of religious clothing in employment. The questions in the two preliminary references address many of these points.

After an overview of the judgments in *Achbita* and *Bougnaoui* and the criticism raised against these, the questions in the preliminary references have been examined. There is support for the argument that an employer’s policy, prohibiting the wearing of any visible signs of political, ideological or religious beliefs, constitutes direct religion or belief discrimination. As the *Arbeitsgericht* Hamburg argues, applying the CJEU’s definition of direct

⁹⁶ ECtHR: *Eweida and Others v. the United Kingdom*, paras. 94-95.

⁹⁷ Case C-804/18 *IX v. Wabe e.V.*; Case C-341/19 *MH Müller Handels GmbH v. MJ*.

⁹⁸ Case C-157/15 *Achbita v. G4 S*; Case C-188/15 *Bougnaoui v. Micropole*.

discrimination in *Chez*⁹⁹ to the case could lead to a finding of direct discrimination. What the CJEU held in *Feryn*¹⁰⁰ could also support this. And, it could be argued that there is direct discrimination because the neutrality policy is based on stereotypes and prejudices. Although the *Bundesarbeitsgericht* does not ask about direct discrimination, it was argued that the policy in that case would constitute (direct) religion or belief discrimination because it does not cover all manifestations of beliefs equally.

The preliminary references raised a number of issues regarding indirect discrimination. First, it was submitted that a policy of neutrality constitutes indirect discrimination on the grounds of religion or belief and gender and on a combination of these grounds. Second, in relation to a neutrality policy being accepted as a legitimate aim which could justify indirect discrimination, it was suggested that the CJEU should explain why this is so as the employers in both the earlier cases and the preliminary reference cases are private employers. The CJEU should also explain why, if the wish of a customer not to be served by someone wearing a headscarf is not a genuine and determining occupational requirement, it is allowed to prohibit the same employee to wear a headscarf when the employer makes the wish of the customers their own through a general neutrality policy, as the *Arbeitsgericht* Hamburg asks.¹⁰¹

Third, it was submitted that a policy such as that in *MJ*, which only prohibits prominent and large scale signs of religious, political and philosophical beliefs, constitutes direct discrimination. However, if the CJEU sees this as indirect discrimination, it should hold that this cannot be justified because it is not a necessary and proportionate means to achieve the aim pursued. The more difficult question here is what should be taken into account in the decision on justification of indirect discrimination. It was submitted that, in deciding on proportionality, the rights and interests of both parties must be weighed in the balance and that this includes not only the employer's freedom to conduct a business (Article 16 EUCFR), but also the Charter rights which protect the employee's freedom to manifest their religion (Article 10), their right to be free from discrimination (Article 21) and their right to working conditions which respect their dignity (Article 31). Articles 22 and 23 EUCFR should also be taken into account.

⁹⁹ Case C-83/14 *CHEZ Razpredelenie Bulgaria*.

¹⁰⁰ Case C-54/07 *Feryn*.

¹⁰¹ Case C-804/18 *IX v. Wabe e.V.*; para. 100.

The preliminary references also raised questions on the status of national constitutional norms and their relation to Article 8(1) of Directive 2000/78/EC. Both referring courts ask whether national guarantees of the right to freedom of religion can offer more protection or if such constitutional rules should be set aside because of primary EU law, even if such law recognises national law and practices, as Article 16 EUCFR does. There has been confusion regarding the meaning of the judgments in *Achbita* and *Bougnaoui* for the national laws in the Member States and different opinions were brought forward regarding whether these judgments allow for stricter rules at the national level.¹⁰² However, it was submitted that it was up to the CJEU to decide on this question. For the argument made here, the question was not very relevant, as it was submitted that the CJEU itself, in *Achbita*, should have used a more thorough proportionality test to establish whether the discrimination was justified. If the CJEU decides that there is indirect discrimination in *IX* and *MJ*, it should apply a more rigorous proportionality test, by using the three questions given by Sledzinska-Simon: is there a rational connection between the aim and the means; is the impairment of the right minimal, and are there no alternative, less impairing means that would serve the aim equally well; and, has a fair balance has been struck between the benefit of achieving the aim and the harm resulting from the infringement of the right.¹⁰³ This should include a consideration of all rights and interest involved for both parties. Only by doing this, will the CJEU provide protection against religion or belief discrimination which is on a par with the protection provided against discrimination on the other grounds covered by EU law.

Therefore, the two preliminary references provide the CJEU with the opportunity to address a number of issues that it left unanswered in *Achbita* and *Bougnaoui* and to demonstrate that the ground of religion and belief is not the poor relation of EU anti-discrimination law. In this, the CJEU can show that it respects the Union's religious diversity, as Article 22 EUCFR requires it to do.

¹⁰² See: Howard, *Religious Clothing and Symbols in Employment* (2017), p. 78.

¹⁰³ A. Sledzinska-Simon, in Belavusau and Henrard (2019) p. 210.